transfer from Equitable Nominees to the respondent was effective to vest title in him as a registered proprietor notwithstanding that he acquired his interest under an instrument that was void. (See *Fraser* v. *Walker.*[12] In *Breskvar* v. *Wall*[13] Barwick C.J. said:—

"The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in *Frazer* v. *Walker (supra)* of the decision of the Supreme Court of New Zealand in *Boyd* v. *Mayor of Wellington*, [1924] N.Z.L.R. 1174, 1223, now places that conclusion beyond question."

I must say in conclusion that an order made by a judge in the exercise of his discretion cannot be disturbed by this court unless it can be shown that in the exercise of such discretion he acted contrary to recognized principles. (See *Culver* v. *Beard.*[14]) As Lord Denning M.R. said in *Hodges* v. *Harland & Wolff Ltd.*,[15] when a judge exercises a discretion and takes all the relevant considerations into account, it is well settled that the burden is on anyone coming to this court to show that he was wrong. I can see nothing wrong in the way in which the learned judge dealt with this case in ordering final judgment to be entered against the appellant. He was also right in holding that no case had been made out of there being a valid counterclaim against the respondent.

I would dismiss this appeal with costs.

Raja Azlan Shah and **Wan Suleiman F.JJ.** concurred.

Appeal dismissed.

Solicitors: *K. Raja Nayagam & Co.; P. G. Lim & Co.*

SHEIKH ABDULLAH BIN SHEIKH MOHAMED v. KANG KOCK SENG

[F.C. (Gill C.J. (Malaya), Ali and Ong Hock Sim F.JJ.) November 28, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 34 of 1974]

Practice and Procedure — Interrogatories — Application for leave to deliver — Matters to be considered by court — R.S.C. 1957.

In this case the appellant was a director and shareholder of a private company. He had executed documents selling and assigning his entire shareholding in the company to the first respondent. Subsequently, he brought an action for a declaration that the documents executed by him were void on the ground that he had executed them as a result of the fraud, duress and misrepresentation of the first respondent. After the close of the pleadings, the appellant applied for leave to deliver certain interrogatories to the first respondent. The learned judge who heard the application refused it on the ground that as the main question in issue was the circumstances leading to the plaintiff executing the three documents and none of the interrogatories related to that question. The appellant appealed.

Held, allowing the appeal: (1) although interrogatories must be confined to matters which are in issue, they may under some circumstances extend to facts the existence or non-existence of which is relevant to the existence or non-existence the facts directly in issue. In considering whether the interrogatories should be allowed or not the court must consider whether they are designed to obtain admissions of facts which will reduce the issues, shorten the length of the trial and thus save costs. In this case the interrogatories satisfied all these tests and should have been allowed;

(2) as interrogatory 3(e) related to the contents of documents, so that what was being asked was secondary evidence of documents it should be struck out.

Cases referred to:-

(1) *Marriott* v. *Chamberlain* (1886) 17 Q.B.D. 154.

(2) *Osram Lamp Works Ltd.* v. *Grabriel Lamp Co.* [1914] 2 Ch. 129.

(3) *Attorney-General* v. *Gaskill* (1882) 20 Ch. 519.

(4) *Leitch* v. *Abbot* [1886] 31 Ch. 374.

(5) *Lyell* v. *Kennedy (No. 1)* (1883) 8 App. Cas. 217, 228.

(6) *Ellis* v. *Ambler* (1877) 36 L.T. 410.

(7) *Wolverhampton New Waterworks Company* v. *Hawksford* (1859) 141 E.R. 283.

(8) *Robinson and Others* v. *Badgett & Co.* [1884] W.N. 94.

(9) *Sampson Morris and Ann* v. *John Edwards* (1890) 15 App. Cas. 309.

FEDERAL COURT.

N. T. Rajah (*V. Balendram* with him) for the appellant.

Peter Mooney (*C. Paramjothy* with him) for the respondent.

Gill C.J.: This was an appeal from a judgment of Syed Othman J. dismissing an application by the plaintiff in the action (the appellant) for leave to deliver certain interrogatories to the first defendant in the action (the respondent).

The plaintiff was a director and shareholder of a private company known as The United Malaysia Traders Sendirian Berhad which was formed in 1960. The other directors and shareholders of the company were the second, third and fourth defendants. All four of them held 100 shares of $10 each fully paid up in the company. The company possessed certain properties one of which was a fairly large piece of land known as the Bukit Hitam area held under mining certificate No. 2/68 Keratong in the State of Pahang.

On 6th January 1970, at the request of the first defendant, the plaintiff executed in favour of the first defendant a power of attorney and an agreement selling and assigning absolutely his entire shareholding in the company to the first defendant. He also signed on the same date a letter prepared by the first defendant resigning from the board of directors of the company.

On 7th July 1970 he brought an action in the High Court in Kuantan for a declaration that those three documents were void on the ground that he had executed them as a result of fraud, duress and misrepresentation on the part of the first defendant, and for certain consequential reliefs.

The action came up for hearing on 23rd September 1971, but it was adjourned to a date to be fixed after the plaintiff had given some evidence, as some questions arose about evidence in relation to some

documents and the calling of witnesses, one of whom was said to be in Australia and another who should have been called but had not been subpoenaed. The plaintiff was ordered to pay the costs of the adjournment.

On 23rd March 1972, the plaintiff obtained an order of court to add United Malaysia Traders Sendirian Berhad as the fifth defendant in the action, and for leave to amend the writ and the statement of claim. Following the order the Company was made a party to the action and an amended writ and a further amended statement of claim were filed in April 1972. The fifth defendant filed its statement of defence on 7th October 1972. Thus for all practical purposes the case was to start afresh.

The defence of the first defendant was that the plaintiff had made a voluntary sale of the plaintiff's entire shareholdings in the company for $40,000 and the defence of the other defendants was to the effect that the company had been inactive since its incorporation and that they were not parties to the fraud.

The application to deliver interrogatories was made on 13th July 1972. Question 1 in the interrogatories was whether the first defendant had been the financier of the plaintiff and the other defendants since 1965. The other 5 questions were in respect of any transaction between the company and the Rompin Mining Company, Dungun relating to the land held under the mining certificate, some related matters and payments alleged to have been made by the said mining company to the first defendant.

In dealing with the application the learned judge took the view that, as the main question in issue was the circumstances leading to the plaintiff executing the three documents, none of the interrogatories related to that question. Counsel for the appellant contended before us that the questions sought to be put to the first defendant were meant to show that the first defendant had withheld information from the plaintiff in order to induce the plaintiff to execute those documents and that on the dates specified in the interrogatories the first defendant had obtained large sums of money from Rompin Mining Company. The view which we took was that although interrogatories much be confined to matters which are in issue, they may under some circumstances extend to facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue. (See *Marriott* v. *Chamberlain*;[1] *Osram Lamp Works Ltd.* v. *Gabriel Lamp Co.*[2]). In considering whether the interrogatories should be allowed or not the court must consider whether they are designed to obtain admissions of facts which will reduce the issues, shorten the length of the trial and thus save costs. In our judgment the interrogatories in this case satisfied all those tests.

Another reason stated by the judge for disallowing the interrogatories was that the matters to which they were directed were within the knowledge of the plaintiff. But the mere fact that the party has knowledge does not mean that interrogatories cannot be delivered, because the object of interrogatories is to enable a party to obtain admissions from the other party and so to relieve himself from the necessity of adducing evidence. (See *Attorney-General* v. *Gaskill*[3]).

A further reason for disallowing the interrogatories was that, as the plaintiff was charging fraud, it was for him to prove the particulars of fraud as set out in his statement of claim and not for the first defendant to supply him with those particulars. It is to be observed that the plaintiff was not seeking particulars of fraud but particulars of facts relating to a transaction in order to relieve himself of the burden of proving them. Even if he was asking for particulars of fraud, he was entitled to do so. (See *Leitch* v. *Abbot*[4]).

Counsel for the first defendant objected to some of the questions on the ground that the answers to them may incriminate him. The answer to this objection by counsel for the plaintiff was that it was necessary to the plaintiff's case that he should get definite answers from the first defendant to the questions relating to the transaction with the mining company. This led the learned judge to observe that the plaintiff was fishing for evidence as to whether or not the defendants made a vast sum of money out of the transaction with the mining company.

Before us counsel for the appellant contended that none of the interrogatories could possibly be described as "fishing interrogatories." We agreed with that contention. Only such interrogatories as are designed to prove a cause of action or defence not as yet pleaded, or to establish a cause of action against a third person, can be rightly called "fishing interrogatories". In other words, they are interrogatories which do not relate to any matter in question in the cause or matter. As regards questions the answers to which may incriminate the party concerned, the rule is to allow all such questions as are material to be put and let any objection to answer them be taken on oath by the interrogated party at the stage of answering them.

The learned judge next took the point that the plaintiff would be able to show the amount involved in the transaction with the mining company since an undertaking had been given that the proper officer of the mining company would give evidence at the trial. But, as Lindley L.J. said in *Attorney-General* v. *Gaskill*[3] at page 530, it is no reason for declining to answer interrogatories to say that some information may be got by cross-examination at the trial. It is not a good objection to allowing an interrogatory that the party interrogating has other means of proving the facts in question, since the legitimate purpose of interrogatories is to obtain admissions: *Lyell* v. *Kennedy (No. 1)*.[5]

In addition to all his other reasons for dismissing the application, the learned judge took the view that on the authority of *Ellis* v. *Amber*,[6] he did not have to consider the application at all as the plaintiff had given no reason for presenting the interrogatories after the pleadings had been closed. But the case was decided under the old rule as to interrogatories. Cases decided under the old rule indicate that only in exceptional circumstances would the court give leave to deliver interrogatories after the close of the pleadings. The position under our new rules is that it is only in exceptional circumstances that an order for

leave to deliver interrogatories will be made before the close of the pleadings. This is clear from the following passage in *Atkins'* Court Forms 2nd Ed. Vol. 22 page 367.

"Although the court has jurisdiction to grant leave to interrogate at any stage of the proceedings, in practice leave will not be granted, unless there are exceptional circumstances, before the pleadings are closed and the issues to be tried are clearly defined. It has been said that interrogatories must relate to an issue between the parties, and since the issues are not generally clear until after defence, such a course would be very unusual and the burden on the applicant to persuade the court that leave should be given would be a heavy one. Indeed, interrogatories are not very often ordered (other than by consent) until after discovery has taken place."

The learned judge, through an oversight, referred to the above passage for the contrary view.

Counsel for the respondent conceded that he could not support the whole of the judge's judgment but he contended that some of the interrogatories could not be said to be relevant to the issues. We disagreed. He also contended that some of the interrogatories related to contents of documents, so that what was being asked was secondary evidence of documents. For this contention he relied on the authority of *Wolverhampton New Waterworks Company* v. *Hawksford*;[7] *Robinson & Others* v. *Budgett & Co.*;[8] *Sampson Morris, and Ann* v. *John Edwards*.[9] We agreed with this contention. And Counsel for the appellant agreed that interrogatory 3(e) should be struck out.

For the reasons we have stated we allowed the appeal with costs here and in the court below, setting aside the order appealed from and substituting in its place an order that the appellant do have leave to deliver the interrogatories with the exception of interrogatory 3(e), such interrogatories to be answered by the first defendant within 14 days from the date of service of the order.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Wong & Paramjothy.*

BALAN v. NATIONAL ELECTRICITY BOARD EMPLOYEES UNION

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) November 28, 1974]
[Kuala Lumpur — Federal Court Civil Appeal No. 65 of 1974]

Master and Servant — Contract of service — Implied term — Incapacity of servant from illness — Claim for salary.

In this case the appellant had been engaged by the respondent union as their executive secretary. While he was on medical leave he gave the respondent six months' notice of resignation. He remained on medical leave until the expiry of the notice and he then claimed salary for the period. Wan Suleiman J. held that the appellant was not entitled to his salary while he was on medical leave ([1974] 1 M.L.J. 217).

Held, allowing the appeal: as there was no term in the contract of employment that no salary was payable during incapacity, the appellant was entitled to his salary during the period of such incapacity.

Cases referred to:-

(1) *Reigate* v. *Union Manufacturing Company (Ramsbottom) Limited and Elton Cop Dyeing Company Ltd.* [1918] 1 K.B. 592, 605.

(2) *Orman* v. *Saville Sportswear Ltd.* [1960] 3 All E.R. 105, 111.

(3) *Appuhamy* v. *Dato' Ajit Singh* [1970] 1 M.L.J. 194.

FEDERAL COURT.

D. Puthucheary for the appellant.

F. Goonting for the respondents.

Gill C.J. (delivering the judgment of the Court): By an agreement dated 16th October 1968 the appellant was engaged by the respondent union as their Executive Secretary for 5 years from 1st December 1968 at a salary of $500 per month. On 25th September 1972, when he was on medical leave, he gave the respondents six months' notice of resignation in accordance with clause 14 of the agreement to commence from 1st October 1972. He remained on medical leave until the expiry of the notice, and then made a claim for his salary for the period of six months and one-third of the medical fees which he had incurred during that period.

On the respondents refusing to pay, the appellant brought an action in the Sessions Court at Kuala Lumpur for the recovery of $3,000 as salary and $46 as medical fees. The respondents' defence to the action was that the appellant had not turned up for work during the period of notice of resignation and that during that period in breach of his service agreement he had engaged himself in business other than that of the respondents' by commencing his own agency business under the name and style of "Syarikat Pioneer Commercial Agency."

On the evidence produced at the trial of the action, the learned Senior President of the Sessions Court found that despite the fact that the appellant had himself admitted to having assisted in a small way at the Syarikat Pioneer Commercial Agency, for which he was paid small sums which were more in the nature of gifts, such activities did not amount to a breach of the service agreement. He also found as a fact that the appellant was granted medical leave for the whole period by one Dr. Sundrum on account of his illness.

As regards the question whether the appellant was entitled to his salary during his absence from work on account of his illness, the learned President decided on considering the relevant authorities on the point that it was an implied term of the contract under which the appellant was employed that he was so entitled. In the result he gave judgment for the appellant as claimed.

The respondents appealed to the High Court. Wan Suleiman J. in dealing with the appeal agreed with the learned Senior President's finding that the appellant was ill during the relevant period so as to justify his being on medical leave, and that the appellant's activities in Syarikat Pioneer did not amount to a breach of the service agreement. But he disagreed with the learned President's finding that the appellant was entitled to his salary under an implied term of the contract. The view which his Lordship took